In the Supreme Court of the United States.

OCTOBER TERM, 1918.

JAMES J. BROUGHAM and ARTHUR N. Stankey, appellants,
v.
BLANTON MANUFACTURING COMPANY. } No. 247.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

STATEMENT.

This is an injunction suit against officials of the Department of Agriculture charged with the administration of the meat inspection acts and involves the right of the appellee to ship, in interstate commerce, its product under the name of "Creamo Oleomargarine."

The district court sustained the right and enjoined the officials from interfering with it. The Circuit Court of Appeals was divided in opinion, but the majority affirmed the decree.

THE LAW.

The meat inspection acts of June 30, 1906, and March 4, 1907 (34 Stat., ch. 3913, p. 669, and ch.

2907, p. 1260), require an inspection of all meat and meat-food products prepared for interstate or foreign commerce and provide that no person, firm, or corporation shall offer for transportation, and no carrier shall transport in interstate or foreign commerce any such products unless marked "Inspected and passed," and that—

> no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted. (34 Stat., ch. 2907, p. 1262.)

THE FACTS.

The appellee, or its predecessor, began the manufacture of oleomargarine in 1902 and, at that time, adopted the name "Creamo Oleomargarine" for its product. (R. p. 33.) The reason for selecting this name is shown by the following from the testimony of the president of appellee company (Rec. p. 59):

> Q. Now, in selecting the word "Creamo," what was your purpose in choosing or coining that word?
>
> A. My purpose—at that time the oleomargarine industry was in its infancy. The butter interests were circulating stories to the effect that oleomargarine was produced from sewerage and dead horses. We found it necessary to do something to combat that belief and to convey to the women what the goods were we

have; we must have a term that while not descriptive was suggestive.

Q. Suggestive of what?

A. Suggestive of cream. At that time we were using 30 per cent of cream in those goods, and we wanted to suggest the fact that this was not a dead horse but was a cream product.

Q. And that has been the purpose ever since, hasn't it?

A. Absolutely, ever since.

When the meat inspection act was passed and when the appellee, in 1907, submitted, for approval, its label bearing the name "Creamo Oleomargarine," it was still using cream, and the label was approved. It was then using and has ever since used letterheads on which were conspicuously printed these words:

THE BLANTON COMPANY

CHURNERS OF

Creamo

THE ONLY

FULL CREAM BUTTERINE

The same witness, testifying in March, 1914, explains this letterhead and the reason for its use as follows:

We have used that form the last eight years. That form was originally taken from the cheese industry. At that time we were using a cream

> milk that was full cream, and when you make cheese from a "full milk cream" they call it a full cream cheese. Our competitors at that time were using a skimmed milk, and we wanted to bring out the fact in our literature, as we assumed we had a right to so qualify our goods, that we were using whole cream milk. You don't understand that, because you are not in the cheese business, but that don't mean it is a solid cream and you can pick it up like butter. (Rec. p. 65.)

Subsequently, appellee gave to some of its products the names of "Clover Creme," "Fulcreme" and "Extracreme," but upon complaint of the Department of Agriculture that these names were misleading, they were abandoned. (Rec. pp. 65, 66.)

In 1911, labels bearing the name "Creamo Oleomargarine" were again approved. It does not affirmatively appear whether at that time the product, with respect to containing cream, was the same that it was in 1907 or not. But it does appear that no change in this respect was made for several years after 1907. However, appellee finally abandoned the use of cream and has since used skimmed milk. Its president explains the change by saying that the "Government's milk chemist had discovered that it was not the butter fat in milk which produced the flavor—the flavor comes from skimmed milk, and therefore we could get as much flavor from skimmed milk as whole milk," and says:

> We did not fall into that line until several years after our competitors had fully estab-

> lished the quality of those goods. And it is a well-known fact in manufacturing circles to-day that a good pure skimmed milk will produce as much flavor in a neutral—more so than the milk with the cream in it. The cream being a butter fat, is a substance that decomposes and becomes rancid and, as a matter of fact, better goods can be produced with the scientific use of skimmed milk than can be produced with the use of excessive amounts of cream which decomposes and becomes rancid. (Rec. p. 67.)

A label bearing the words "Creamo Oleomargarine" was again approved about July 6, 1912. (Rec. p. 46.) But, by letter dated August 8, 1912, appellee was notified that the department had concluded that the label conveyed a false inference to the consuming public and should not be used. (Rec. p. 57.) At that time the use of cream had been abandoned and skimmed milk was used instead. (Rec. p. 64.) And the product contained a very considerable quantity of oleo oil and neutral lard. (Rec. p. 56.) Following the notice of August 8, 1912, there was a large amount of correspondence and negotiations, the department insisting that the suggestion of cream in the name was deceptive and the appellee taking the opposite view. In a letter dated May 20, 1913, appellee said:

> If "Creamo" is a trade name and is synonymous with the word "cream," then we are building a business on falsehood and deception, which is neither right nor good business. If, on the other hand, "Creamo" does not spell and necessarily mean "cream," and is not a

> trade name, then we are advised that its use is legal and we are within our rights. (Rec. p. 67.)

The department offered to permit the continued use of the name "Creamo Oleomargarine" if appellee would put on the same label a statement that the product contained no cream. (Rec. p. 68.) It also offered, if the oleomargarine contained not less than 10 per cent of cream, to approve a label bearing the words "Creamo Brand Oleomargarine." (Rec. p. 61.)

No agreement was reached and the appellee continued to use the name "Creamo Oleomargarine." Finally, on February 10, 1914, appellee was notified that the use of the label bearing that name would not be permitted after the following March 1. (Rec. p. 11.) This meant, of course, that the inspectors would refuse to mark the product "Inspected and passed" and it could not be shipped in interstate and foreign commerce. To prevent this action, the bill in this cause was filed.

ACTION OF COURT BELOW.

In the Circuit Court of Appeals, in the majority opinion, it was said:

> We are not desirous of deciding more than is before us and must pass upon the question whether the Department of Agriculture could pass upon and approve a trade name under this last statute, which we find "Creamo Oleomargarine" was and is, and approve it in 1907 and again in 1912, and later, after an

> established business had been built up under that name, and a vast sum of money expended in the business, with or without evidence, change its ruling, and refuse to allow the use of the trade name. (Rec. p. 95; 243 Fed., 507.)

And, after indicating the view that the name was, in fact, not deceptive, the opinion concluded:

> Could the Department of Agriculture approve the use of the label "Creamo Oleomargarine" as provided in the Meat-Inspection Law, and then, after a trade had been built up and extended under that name, and vast sums of money expended in advertising it, change its ruling and forbid its use unless 10 per cent, for instance, of cream was used in the manufacture? We are constrained to say that we do not think any such power was vested in the Secretary of Agriculture.
>
> The decree of the district court was right, and it is affirmed. (Rec. p. 96; 243 Fed. Rep. 503, 508.)

Judge Amidon, dissenting, held that:

> (1) The label in question was false and deceptive.
>
> (2) The finding by the Secretary of Agriculture to that effect is conclusive.
>
> (3) The fact that the Secretary of Agriculture has once approved a label does not prevent his afterwards condemning it if it is afterwards found to be used for false and deceptive purposes.

ASSIGNMENTS OF ERROR.

The assignments of error appear at pages 100 and 101 of the record, and challenge, upon the facts above stated, the correctness of the decree granting an injunction.

BRIEF.

(I)

Since the product in question contains a substantial quantity of oleo oil and neutral lard, it is a meat food product, and can not be shipped in interstate or foreign commerce unless first marked "Inspected and passed." (Rec. p. 56; 34 Stat., ch. 3913, p. 669, and ch. 2907, p. 1260; *Pittsburgh Melting Co.* v. *Totten*, No. 28, Oct. Term, 1918; decided Nov. 4, 1918.)

(II)

The avowed purpose in adopting the name "Creamo Oleomargarine" was to suggest cream as one of the constituents of the product. When, therefore, appellee ceased to use cream the name became false and deceptive, and its use was prohibited by the statute cited above. (Rec. pp. 33, 57, 59, 64, 65, 66, and 67.)

(III)

The determination of the falsity and deceptiveness of a given name as applied to a given product is a question of fact committed by Congress to the Secretary of Agriculture, and his decision is conclusive. (*Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109; *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, 323; *Johnson* v. *Drew*, 171

U. S. 93; *Gardner* v. *Bonestell*, 180 U. S. 362; *Decatur* v. *Paulding*, 14 Pet. 497; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Marquez* v. *Frisbie*, 101 U. S. 473; *Gaines* v. *Thompson*, 7 Wall. 347; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40; *Redfield* v. *Windom*, 137 U. S. 636.)

(IV)

If the name in question had, in fact, been false and deceptive when approved by a former Secretary, this would not preclude the present Secretary from making a ruling in accord with the actual facts. (*Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408, 414; *United States* v. *Pine River Logging & Improvement Co.*, 89 Fed. Rep. 907, 917; *United States* v. *Lee Wilson & Co.*, 214 Fed. Rep. 630, 651.)

ARGUMENT.

That oleomargarine, as made by appellee, composed largely of oleo oil and the fat of pigs, is a meat food product can now scarcely be the subject of argument. (*Pittsburgh Melting Co.* v. *Totten*, No. 28, October Term, 1918; decided Nov. 4, 1918. It, therefore, can not be lawfully shipped in interstate or foreign commerce unless it is first marked "Inspected and passed" by a Government inspector. It can not be lawfully so marked if offered for sale under a false or deceptive name. It may, however, be offered for sale under an established trade name provided such trade name is one which

is "*not false and deceptive and which shall be approved by the Secretary of Agriculture.*" Waiving, for the moment, the point that whether a trade name is false and deceptive or not is committed by the act to the judgment of the Secretary of Agriculture, the case presents the question, is the name "Creamo Oleomargarine" false and deceptive when applied to appellee's product, which now contains no cream? If capable of serving the purpose for which it was adopted in 1902, it is undoubtedly false and deceptive. We are not left to speculate as to what that purpose was. The president of appellee has frankly stated it. He says it was to suggest cream as an ingredient and to let the women whose trade was sought know that the oleomargarine was a *cream* and not a dead horse product. It may be conceded that when adopted the name was not false and deceptive, for the product actually contained 30 per cent of cream. Confessedly and purposely it then carried the suggestion that the product contained a substantial quantity of cream. The suggestion was not then misleading, because it was true. The name still carries the same suggestion which is emphasized by the use of advertising matter which describes the product as "The only Full Cream Butterine." (Rec. p. 65.) But no cream is used. The suggestion is therefore false and misleading. As an original proposition, therefore, it can scarcely be doubted that, when applied to appellee's product as now made, the name is intentionally false and deceptive.

The majority of the Circuit Court of Appeals, however, made the case turn on the proposition that the Secretary of Agriculture having approved the name was powerless to reverse his ruling and require its abandonment after appellee had spent large sums of money in establishing a business. It is respectfully submitted that the facts present no such question. The real question is, can a manufacturer adopt a name which suggests one of the principal ingredients of his product and lawfully continue to use that name to sell a product which does not contain the suggested ingredient? If the appellee has established a trade by using a name which gives the public to understand that its product is a cream product, has it the right to sell a substitute, containing no cream, under the same name? The purpose of the legislation in question was twofold—to prevent the sale of unwholesome food and to enable the purchaser to know what he is buying. It may be true that the appellee's product is as wholesome as or even more wholesome than it was when cream was used. But one who purchases it believing that there is virtue in cream, as appellee has taught him to believe, is undoubtedly deceived and does not get what he supposes he is buying. If, therefore, the question as to whether the name "Creamo Oleomargarine" as applied to appellee's present product is false and deceptive be treated as now open for determination, there would seem to be scarcely no room for doubt that it is false and deceptive within the meaning of the statute.

However, that question has been foreclosed. The portion of the statute quoted permits the use of such a name only when it is both "not false and deceptive" and "approved by the Secretary of Agriculture." Whether a particular name is false and deceptive is exclusively a question of fact, and its determination has thus been committed to the Secretary of Agriculture. And this Court has said:

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing. (*Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109.)

And this rule has frequently been applied. (*Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, 323; *Johnson* v. *Drew*, 171 U. S. 93; *Gardner* v. *Bonestell*, 180 U. S. 362; *Decatur* v. *Paulding*, 14 Pet. 497; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Marquez* v. *Frisbie*, 101 U. S. 473; *Gaines* v. *Thompson*, 7 Wall. 347; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40; *Redfield* v. *Windom*, 137 U. S. 636.)

When, therefore, the Secretary of Agriculture decided that, after appellee ceased to use cream, the

name "Creamo Oleomargarine" was false and deceptive, his decision was conclusive of that question of fact.

We have seen that the name in question, when approved, was not false and deceptive as applied to the product then being put upon the market. But if the facts were otherwise, the approval of the then Secretary of Agriculture could not preclude his successors, upon a further investigation, from making a ruling in accord with the facts. The police power and the rights of the Government can not be thus impaired. (*Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408, 414; *United States* v. *Pine River Logging & Improvement Co.*, 89 Fed. Rep. 907, 917; *United States* v. *Lee Wilson & Co.*, 214 Fed. Rep. 630, 651.) Our view can not be better presented than by quoting from the dissenting opinion of Judge Amidon in the court below, as set out on pages 98 and 99 of the record and reported in 243 Federal Reporter 508, 510, as follows:

> It seems to me too plain for debate that an executive officer appointed to enforce a statute can not by any act or omission of his impair the power of the Government through a subsequent officer to enforce a police statute. To hold otherwise is to give such officers the power to annul the law. It might well happen that the use of a name at the time of its selection, and even for years thereafter, would appear to be innocent, and would be approved in the routine course of administra-

> tive business; then upon a careful investigation it would be found that the name was chosen and was actually used in the channels of trade for false and deceptive purposes. That seems to be what has occurred in the present case. It seems to me an alarming doctrine that the approval of a name which was in effect selected for purposes of deception can destroy the power of the Government to stop the fraud.

It is respectfully submitted that the ruling of the majority of the court below is erroneous and the judgment should be reversed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

JANUARY, 1919.

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SUPREME COURT OF THE UNITED STATES

October Term, 1918

No. 247

James J. Brougham and Arthur N. Stankey
Appellants

vs.

Blanton Manufacturing Company

Appeal from the United States Circuit Court of Appeals (Eighth Circuit)

STATEMENT AND BRIEF FOR APPELLEE

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(26,096)

Received copy of within brief this March 8, 1919.

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The Trade Label
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Supreme Court of the United States

October Term, 1918

JAMES J. BROUGHAM, *et al.*, *Appellants*

vs.

BLANTON MANUFACTURING COMPANY, *Appellee*

No. 247 (Folio No. 26,096)

Appeal from the United States Circuit Court of Appeals (Eighth Circuit)

STATEMENT FOR APPELLEE

Appellee was obliged to resort to this suit in February, 1914, to enjoin appellants (as officers in charge of the *Bureau of Animal Industry*) from revoking approvals of a trade-mark "Creamo", which approvals had been given it by three Executive Departments. Those officers (threatening to withhold inspection certificates, Rec. p. 79) forbade the use by appellee of that mark upon its packages shipped from St. Louis in interstate commerce, from and after March 1, 1914; before which date appellee obtained a temporary injunction restraining appellants until further order from interfering with the use of the trade-mark in question (Rec. p. 14). The District Court made the injunction perpetual. The Court of Appeals affirmed the decree, in an opinion exhibiting the chief facts of the case (243 Fed. 503). Defendants appealed to this Court.

The Facts

In 1902 (Rec. p. 33) the new word "**Creamo**" had been coined and applied by the predecessor of appellee as a trade-mark on its manufactured goods.

According to plaintiff's evidence, "**Creamo**" is "an arbitrary word, absolutely coined word"; "not in the dictionary" (Rec. p. 44) means "nothing but a distinguishing mark to distinguish our goods from the other goods on the market" (Rec. p. 59). The structure of the word "Creamo" is naturally *suggestive* of cream (Rec. p. 59) which latter word means a superior article or quality of the thing intended, as it may also mean the fatty part of milk. But "**Creamo**" is not *descriptive* of cream in either sense. It is an invented or fancy word (Rec. pp. 35, 44) to designate this manufacturer's product, which is always and only sold under a label bearing the name "*Oleomargarine*", the legal trade-name with which packages of "*Butterine*" and all other substitutes for butter, defined by the special Revenue law on the subject (See our **Appendix A**, p. A 3, for copy; secs. 2, 6) are required to be labeled when sold.

"**Creamo**", as a proprietary mark upon this product, was officially approved both in form and language by the COMMISSIONER OF INTERNAL REVENUE and the Treasury Department, by letter of the former, January 19, 1904 (Rec. p. 29) under *Regulations* (Int. Rev. No. 9, July 1907) which permit manufacturers to put upon their packages some word or other such trade-mark, provided the word "*Oleomargarine*" also appears thereon, "in **close proximity** thereto" "so as to be read as a word in association with such name, word or mark". Those *Regulations* are authorized by

the *Oleomargarine Act* of Aug. 2, 1886, sec. 6 (24 Stat. 209) which require this product to be "*marked, stamped* and *branded* as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." The appellee's manufacture of its product has been conducted under the inspection of the Internal Revenue Department (Rec. pp. 34, 37) from a time before supervision of the appellee's establishment began by an inspector of the Bureau of Animal Industry, in charge (Rec. p. 54) not long after passage of the *Meat Inspection Law*. Against the latter inspection there was an unavailing protest by appellee, which then claimed (Rec. p. 56) that the Internal Revenue Department had jurisdiction over the marking and branding of oleomargarine because specially charged with the oversight of this product for revenue purposes. Appellee has paid all license and other taxes required by the Internal Revenue Department (Rec. pp. 33-34). No objection has ever been made to the present time (Rec. pp. 42-3) by that Department to the use of "**Creamo**" as a proprietary brand on this product along with the word "**Oleomargarine**", under which trade-name it was always sold. Meanwhile, in 1908, at the suggestion of appellee, there was a modification in the Internal Revenue *Regulations* so as to permit the use of small cartons for prints or bricks of this product, in the packing by manufacturers, "provided such packages" * * * "are marked, stamped or branded as required by the regulations relating to wrapper covering any brick, print or roll of oleomargarine" (Rec. p. 35).

Following approval in 1904 by the Commissioner of Internal Revenue, appellee expended "in publishing

and advertising", to extend the business done under the approved trade-mark, an average of $7,500.00 a year, up to the time of the trial (Rec. p. 43). Before this suit began, the trade-mark "**Creamo**" had increased in value. Several advertising and publishing experts testified, without contradiction, that this mark was worth from $225,000 to a half million dollars (Rec. pp. 72-3) and was growing "more valuable every year" (Rec. p. 72).

After the enactment (in 1906) of the *Meat Inspection* and *Food and Drug Acts* appellee's trade-mark "**Creamo**" on oleomargarine was approved by the Bureau of Animal Industry in the Department of Agriculture at least three times:

1. May 22, 1907 (Rec. p. 31)
2. Again April 28, 1911 (Rec. pp. 40-41)
3. Again July 8, 1912 (Rec. pp. 12, 46)

In each instance the approval was communicated by official letters from officers of the Bureau of Animal Industry. In each instance also those gentlemen first required some minor alteration in the literature of the label, which alteration was accordingly made immediately. In none of those instances was there any suggestion of objection by any official of that Bureau or Department to "**Creamo**" as a trade-mark upon appellee's goods (Rec. pp. 30, 39, 55).

After those approvals by the Treasury Department and later by the Department of Agriculture, appellee applied to the Interior Department (Jan. 6, 1908) for registration of the mark in the Patent Office (under the *Act* of Feb. 20, 1905) and was accorded registration of "**Creamo**" (June 9, 1908) as a "trade-mark for *Oleomargarin*" (Rec. p. 47).

Appellee Offered Every Reasonable Concession

Within a month (Aug. 8, 1912, Rec. p. 57) after a third approval of the mark "**Creamo**" by the Bureau of Animal Industry, officers of the latter began steps to **revoke** the approval (Rec. pp. 52; 85-7; 11) and, incidentally, to **revoke approvals of the mark by the other two Executive Departments**, already described.

Correspondence followed (Rec. 52-3) in which the Bureau officers firmly maintained the position that unless the word "**Brand**" was added to the word "*Creamo*", the use of the latter would be forbidden and appellee's packages (marked "*Creamo Oleomargarine*") would be denied certificates of inspection essential to shipments in interstate commerce (Rec. pp. 52-3; 84-7). Appellee, while protesting that "**Creamo**" did not mean cream, informed the Department (by letter of May 20, 1913, Rec. p. 66) that appellee had "**decided to return to the use of cream in these goods** and make our formula conform to your interpretation of this label". But the Bureau officers were not satisfied with the return of appellee to the use of cream. They began to raise other objections by letters of May 31 (Rec. p. 60), of June 20 (Rec. p. 61) and Oct. 2nd and 31st, 1913 (Rec. pp. 52, 61). Finally by an ultimatum (in letter of Jan. 31, 1914) they refused appellee any use of its mark "**Creamo**" without the word "**Brand**" following, "**in uniform size, style and color of lettering**" (Rec. p. 87) and notified appellee that any use of the "trade label 'Creamo'" would not be allowed after March 1st, 1914 (Rec. p. 79). The evidence and correspondence show that appellee was "willing to do anything to pacify this department" (Rec. p. 68) unless it destroyed

"the whole aspect of the label". Appellee, in order to save its trade-mark by conforming to the Department interpretation of "Creamo" (Rec. p. 66) guaranteed to use **"over ten per cent cream"** (Rec. pp. 67, 87) in its product; but the Department's answer thereto (Jan. 31, 1914) was this (Rec. pp. 63, 87):

> "With reference to the statement 'Over ten per cent cream' you are advised that exception is taken to the word 'Over' in this statement, this being **too indefinite and therefore misleading**. The Bureau will offer no objection to the exact **percentage of cream** being stated on the label in connection with the name *'Creamo Brand Oleomargarine'*.
>
> Approval of the labels is withheld pending receipt of sketches corrected to conform to Bureau requirements and **accompanied by information relative to the** *percentages of the various ingredients* to be employed in the preparation of the products for which the labels are intended.
>
> In view of the length of time which has elapsed since your attention was called to the fact that certain labels, etc., in use at Est. 668 do not conform to Bureau requirements a copy of this letter is today being forwarded to the inspector in charge, St. Louis, Mo., with instructions that on and after March 1, 1914, he prohibit the use of all labels, wrappers, cartons, etc., which do not bear the bureau stamp of approval and number.
>
> Very respectfully,
>
> ACTING CHIEF OF BUREAU."

(The **display type** is ours.)

Appellee's testimony (Rec., p. 63) explains why it "could not comply with that letter":

"He asks us to do something that is a physical impossibility. He asks us to state the exact percentage of cream in these goods. Cream being a liquid, goes into our goods—it is only solids that we can absolutely save; cream being a liquid, going over these goods, it will be impossible for a chemist to take our goods and say, and we couldn't say, whether ten or twelve or fifteen per cent of cream, and we wanted a carton with safety, we wanted to say over ten per cent. In that letter—the idea was to make us say something on that label that would be a physical impossibility for us to sustain; and the whole treatment is so arbitrary that we could not—the whole treatment has been so arbitrary that it is a physical impossibility to comply with the stand that the Department has taken on this matter, an absolute impossibility."

It was further proven by several witnesses that the change of "**Creamo**" to "**Creamo Brand**" in conjunction with the trade name "Oleomargarine" (whose appearance on the label is obligatory) "**in uniform size, style and color of lettering**" (Rec., p. 87) as demanded of appellee by the last command of the Bureau of Animal Industry (Jan. 31, 1914) would ruin the identity and integrity of the trade-mark (Rec., pp. 50, 58, 62) and "destroy its value" (Rec., pp. 72, 73-4). The appearance of the label as used by appellee (Rec. p. 5) will show the force of that practical objection to the change demanded by the Bureau in that label, for a mere glance will demonstrate that the proposed change could not be made, as prescribed, without a total reconstruction of the label.

None of that testimony was contradicted in any particular. On the contrary, the **Answer** filed by de-

fendants (Rec., p. 17) concedes that the Bureau demanded the introduction of the word **"Brand"** into appellee's trade-mark. Defendants allege therein that the Department

> "offered to approve said label modified so as to read **'Creamo Brand Oleomargarine,'** providing said label should be used only upon oleomargarine containing not less than 10 per cent cream" (Rec., p. 17).

That procedure would directly clash with the Internal Revenue *Regulation* on the subject (See **Appendix A**, p. A 6).

Some inference unfavorable to appellee has been sought to be ascribed to stationery (Rec. p. 64) used by it with the caption "**Creamo**", but that was explained fully. It was **not used on or in the packages** sold (Rec. p. 65). The word "*Full cream*" on the **letter-head** was explained, as well as the change at times in the ingredients of the product (Rec. pp. 67-8) along with proof of appellee's efforts to conform to the Department interpretation and demands, to the utmost limit consistent with retaining the trade-mark as previously approved, and for whose introduction and **publicity** in the business world over $75,000 had been invested (Rec. pp. 43, 71) during a period of **eight or ten years.** It was explained that "*Fullcream*" in the dairy industry means cream from which no **milk has been extracted**; and that that name was advertised "at the time that the Government's milk chemist had discovered that it was not the butter fat in milk which produced the flavor"; that "the flavor comes from skimmed milk, and therefore we could get as much flavor from skimmed milk as whole milk" (Rec. p. 67) that "a good pure skimmed milk will produce as much flavor in a neutral—more so

than the milk with the cream in it. The cream being a butter fat, is a substance that decomposes and becomes rancid; and, as a matter of fact, better goods can be produced with the scientific use of skimmed milk than can be produced with the use of excessive amounts of cream which decomposes and becomes rancid; that is the scientific aspect of the question. This aspect of the question has been developed since we established that line of our stationery. We do not like to change our stationery any more than we like to change our labels. Therefore we continued to use it. It is expensive too" (Rec. p. 68). We have quoted the testimony of appellee's President who continued:

> "Q. Did you—in view of the interpretation which the Department had placed, if you had been permitted to use your regular trade-mark, been willing to use at least ten per cent cream?"
>
> "A. We were willing to do anything that would pacify this department. We wanted to comply with all their rules and regulations and at the same time we wanted to maintain our business without any big financial loss. We went down there and made that plea to the solicitor, and told him that to do the thing that his complaints were asking us to do would cause us great financial loss, and if we could maintain the integrity of this label in a way to meet their requirements and at the same time not lose its identity, that we would be only too glad to do so; but that if they wanted us to do impossible things, and change the whole aspect of this label, that we must be shown finally in court; that we could not lose this property without finding out for certain whether it was legal or not" (Rec. p. 68).

That evidence was not contradicted.

After the Department letter of January 31, 1914 (Rec. pp. 62, 87) already quoted, another (February 10, 1914) was addressed to counsel for appellee (Rec. pp. 11, 53, 79) to notify the latter that after March 1, 1914, "the use of that label **would not be allowed**". Then this suit for injunction was commenced.

On those facts the District Court decreed a perpetual injunction as prayed, and the Court of Appeals affirmed the decree.

As we do not find in this Court any formal specification of error, appellee by its counsel can only respectfully submit that **there is no error in the record**, and that the decree should be **affirmed**.

Questions of Law Involved

On the foregoing facts developed by the record in this cause, the question arises whether the Bureau of Animal Industry has the power to destroy the property of appellee in its trade-mark "**Creamo**" and to deprive appellee of its use, in the manner described? The claim of that power by that Bureau is ascribed to the meat inspection law. Appellee denies the power.

Appellee's Points and Authorities

1. Appellee's food product bears the "established trade name" "*Oleomargarine*", prescribed by section 2 of the statute applicable to it (24 Stat. 209). "*Creamo*" is prefixed thereto as a proprietary brand or designation of the product known to the public as "*Creamo Oleomargarine*" since 1902, (many years before the meat inspection law) and sold as an article of food under a label bearing the legend "*Creamo Oleomargarine*" approved by the Commissioner of Internal Revenue of the Treasury Department under the special law conferring power on him to prescribe the marks, stamps and brands on oleomargarine packages for sale. The use of that approved and statutory brand of this product is not "false or deceptive".

U. S. Int. Rev. Reguls. "*Oleomargarine*" (No. 9, July 1907) p. 7, sec. 6; and pp. 40-41
U. S. v. Coca Cola Co. 241 U. S. 286
Sebastian, *Trade Marks* (5th ed.) 753
Weeks v. U. S. 245 U. S. 618
Kerly, *Trade Marks* (1894) p. 475
U. S. v. 150 cases, 211 Fed. 360

2. "*Such*" meat food products as are indicated by sec. 5 of the meat inspection Act **do not include a food product bearing the trade name** "*Oleomargarine*", prescribed by a special revenue law to be used in the sale thereof, and that statutory name is not "false or deceptive" when so used.

Homer v. Collector, 1 Wall. 486
Lung v. Wise, 176 U. S. 156

Moreover, Sec. 6 of the Oleomargarine Act (24 Stat. 209) requires the article to be packed by the

manufacturer in *new* "**wooden** packages", which are not included in the coverings "*can, pot, tin* or *canvas*" specified in sec. 5 of the meat inspection law, nor by the general words following them, because "firkins, tubs or other wooden packages" (of sec. 6 of the Oleomargarine law) are not *ejusdem generis* with the "can, pot, tin or canvas" coverings, but are more conspicuous and important than they, and were known in the federal statutes before the meat inspection law was enacted. The whole of that section should so interpret the last few lines, and exclude an article like this oleomargarine having a "trade name" **by law.**

Pennington v. Cox, 2 Cr. 52
Homer v. Collector, 1 Wall. 302

3. The *Regulations* of the Bureau of Animal Industry (sec. 5) in evidence (Rec. p. 76) support our construction of the meat inspection law by requiring on the trade label "*The true name of the product*" (besides identifying the maker) which true name is "*oleomargarine*".

4. The Department *Regulation* No. 17, for labels on mixtures under the meat inspection law expressly applies to such products "*other than oleomargarine*", and so excludes the latter from their operation and effect.

U. S. Reguls. B. A. I. Order 211, "*Meat Inspection*", Reg. 17, Sec. 9, paragraph 8, p. 46.
(See our **Appendix A**, p. A 5.)

5. The *Food and Drugs Act, in pari materia*, enacts that "an article of food" containing no poisonous or

deleterious ingredients **shall not be deemed misbranded:**

> "First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced."

This "*Oleomargarine*" bears that statutory trade-name when sold, is an article of food, and is distinctly within that description, and hence should not be considered misbranded.

> **U. S. v. Coca Cola Co. 241 U. S. 286**
> Sebastian, *Trade Marks* (5th ed.) 367

6. No power or authority is conferred by law on the Bureau of Animal Industry to **revoke approval** of a trade-mark for oleomargarine already approved by the Bureau. That power is not incidental to the power of *approval.*

> McCormick v. Aultman, 169 U. S. 609
> Reeside v. U. S., 8 Wall. 43

7. No power or authority is vested in the Bureau of Animal Industry to revoke approval of a proprietary mark approved by the Commissioner of Internal Revenue for use on oleomargarine packages for sale, under the Regulations of the latter specially applicable to that food product; nor to revoke the approval given to the trade-mark by its registration

as such in the Patent Office in the Interior Department.

Parkhurst v. U. S. 29 Ct. Cl. 399
Case v. Quirk, C. D. 1908, 221 (222)

8 After approval of appellee's trade-mark and brand by the Treasury and Interior Departments and the Department of Agriculture (on three occasions from 1907 to 1912) its use for more than ten years, and expenditure of large sums of money in its extension and advertisement, it was not competent for the Bureau of Animal Industry to destroy the property value of this trade-mark by requiring **a change in the language of it**, under penalty of withholding the certification for interstate commerce. The change ordered conflicts with the Internal Revenue *Regulation* which requires the word "oleomargarine" to appear on the label "in close proximity" to the brand if one is used. (See our **Appendix A**, p. A 6.)

9. The approval of the trade-mark or brand by the Bureau cannot properly be cancelled or revoked by a different administration, in such circumstances as here appear.

U. S. v. Stone, 2 Wall. 535
Ballinger v. U. S. 216 U. S. 240
Illinois v. U. S. 20 Ct. Cl. 349

10. The word "*Creamo*" is a valid, original, invented trade-mark, as applied to the food product sold by appellee.

In re Williams, 86 L. J. Ch. 273
Price Co. v. Fyfe, 45 Fed. 800
Kerly, *Trade Marks* (1894) 152 3
Hopkins, *Trade Marks* (3d ed.) p. 142
Lauferty v. Wheeler, 11 Daly 194 (11 Abb. N. C. 220) "*Alderney*" oleomargarine ("Club soda") Cochrane v. Macnish (1896) A. C. 225

11. The fact that such a fanciful, arbitrary, original word as "Creamo" on oleomargarine, adopted as a trade-mark, is *suggestive* of something attractive is no sound objection thereto if the word is neither *descriptive* nor *generic*, as in this case.

("Koffio") Sleepy Eye Co. v. Blanke, C. D. 1898, 662
Penn. Salt Co. v. Myers, 79 Fed. 90
Fairbank Co. v. Lard Co. 64 Fed. 136
Bennett v. McKinley, 65 Fed. 505
Hopkins, *Trade Marks* (3 ed.) pp. 95-6; 194-5

12. The discussions upon some trade-marks are persuasive in their bearing upon ours.

("Corno" feed) U. S. v. Carload, 188 Fed. 453
("Magico") *Ex parte* Am. Chem. Co., C. D. 1893, 16
"Oxo" Ltd. v. King, 34 R. P. C. 165
("Solio") Eastman Co. v. Compt. Gen. (1898) A. C. 571
In re Linotye Co. (1900) 2 Ch. 238
("Marvo Margarine") Tanner v. Dyball, 94 L. T. 538
"Cream" Yeast Powder case, 5 Sawy. 584
"Creamalt" bread, Fox Co. v. Glynn, 191 Mass. 344
"Cream of Wheat," *Ex parte*, 9 Gourick Dig. 74
"Jersey Cream baking powder," 4 Ont. L. R. 301
"Cream rolled oats" (Albers) 171 Fed. 989

13. After appellee decided, in May 1913, to return to the use of cream in its "Creamo" (Rec. p. 66) to satisfy the unreasonable demand of the Bureau, the latter then insisted on appellee's changing the lan-

guage of its trade-mark (Rec. pp. 62, 87) as previously used for more than ten years and approved by three Departments. In those circumstances appellants (as officers of the Bureau of Animal Industry) being without lawful authority to make or enforce such order in the way attempted, **injunction was the appropriate remedy** to protect appellee's property right in the trade-mark from impairment and injury; and appellee has first done all that equity required of it before invoking that remedy.

Menendez v. Holt, 128 U. S. 514
Jacobs v. Beecham, 221 U. S. 263
Moxie Nerve Food Co. v. Modox, 153 Fed. 487
Gaines v. Turner Co. 204 Fed. 553
Diamond Salt Co. v. Worcester Co. 221 Fed. 66
Simmons Co. v. Drug Co. 93 Tenn 84 (23 S. W. 165)
("Club soda") Cochrane v. Macnish (1896) A. C. 225
38 Cyc. 733

14. Before this suit was brought appellee had made more concessions, in respect of its right to manufacture this food product under the trade-mark "Creamo" on oleomargarine than law or equity required; and the final demand of the Bureau (as expressed in its letter of Jan. 31, 1914, Rec. pp. 62, 87, and in its *Answer* to this suit, Rec. p. 17) for a change in the language of appellee's trade-mark to **"Creamo Brand"**, was unauthorized and a proper subject for the injunctive relief decreed by the District Court.

Noble v. Logging Co. 147 U. S. 165

BRIEF OF THE ARGUMENT FOR APPELLEE

We shall abbreviate as much as possible the discussion here but will submit herewith, as **Appendix B,** the brief for appellee in the Circuit Court of Appeals, as part of our argument for consideration by your Honors, in the event our summary prepared for this Court may appear in any respect inadequate. We also submit in an **Appendix A** some excerpts from statutes and *Regulations* which may be appropriately presented in that way for ready reference.

The evidence in the record of the steady growth and present value of the appellee's business, done under this trade mark (Rec. pp. 50, 72-3) gives sufficient warrant for our anxiety to have your Honors become fully acquainted with every phase of the facts involved. We believe appellee has acted in good faith in the choice and use of this trade mark, and that the pretense that it is "false or deceptive", under any law, is an arbitrary, fanciful and strained afterthought without adequate support.

Our **Points and Authorities** exhibit in short compass the law on which we rely. Our argument will be condensed into the following sections:

1. General view of the controversy
2. The statutory powers governing such marks
3. The nature of this trade mark
4. The remedy applied

We should rejoice did we possess the ability to treat this case with such unique brevity as distinguishes the learned Brief for appellants. But we do not. Appellee has found the labors of many years

challenged as deceptive and fraudulent, and the results of long toil and earnest efforts to build up a legitimate business threatened, not by some infringing competitor but by one of the Bureaux of the Government. So appellee is bound to attempt to inform this high Court fully of the circumstances of the case, and its counsel would deem themselves derelict in their duty if any material feature of the record should not be brought to the attention of your Honors.

I

A General View of the Controversy

The word "**Creamo**" to distinguish the oleomargarine made by appellee, was used on the label of its packages and enjoyed as a trademark by appellee and its predecessor for more than ten years, with the approval of the Internal Revenue Department, the Interior Department (of Trademarks) and the Department of Agriculture. It appeared as a brand on its trade product "*Oleomargarine*". Under the close inspection and supervision of those executive Departments, appellee had built up a large and expanding business. Suddenly, in August, 1912, the officers of the Bureau of Animal Industry announced their idea that the label on this proprietary food product was "misleading" or "deceptive", although it had been sold for more than ten years under the brand of "*Creamo Oleomargarine*", so advertised to the public meanwhile at an expense averaging $7,500 yearly, and had never been otherwise questioned by any competitor or any officer of the other Departments. A long correspondence ensued. The Bureau officers claimed (despite the

provisions of the Food and Drugs Act and those of the oleomargarine law) that "**Creamo**" meant cream. They took the position that appellee **must put the word** "Brand" into the trade mark and use cream in making its product. After some dispute (in May, 1913) appellee decided to return to the use of cream to satisfy appellants, although the research department of the Government had demonstrated that **skimmed milk was for several reasons** (Rec. p. 67) better than cream (which had been formerly used) to impart a desirable flavor to oleomargarine. But appellants were not satisfied with appellee's return to the use of cream in his formula for "Creamo Oleomargarine", or with his guaranty to use at least 10 per cent thereof in the product. They continued to insist on a radical change in the label to introduce the word "Brand" in "**uniform size, style and color of lettering**" (Rec., pp. 62, 87) and with that demand (Jan. 31, 1914) ordered him to comply before March 1, 1914, under penalty of withdrawal of the certification necessary for interstate commerce —which meant, of course, the business death of "**Creamo Oleomargarine**". The merits of that invented word "**Creamo**" as a trade mark we will discuss further on. At present we call attention to the fact that we have here no question of infringement, but only issues which arise under the Bureau interpretation of federal legislation. Appellee contends that this is a food product, known by its trade name "Oleomargarine", that the able Bureau officers have no authority to revise the statutory label by rejecting the Internal Revenue *Regulation* which requires a trade-mark to appear thereon "in *close proximity*" to "*oleomargarine*" (See our **Appendix**

A, p. A 6,) under which regulation, appellee's brand has been expressly **approved** by the latter Department (Rec. p. 29). In no aspect of the facts should this product be held *misbranded*. (See our **Point** 5, and cases cited.)

Let us quote a very great Judge (Mr. Justice HUGHES) on one aspect of this subject:

> "A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either 'misleading' or 'false', as it is in fact distinctive."
>
> United States v. Coca Cola Co., 241 U. S. 286

The learned author of that quotation had before him a case arising under the Food and Drugs Act, but the requirements of the Bureau *Regulation* 20 (p. 9) under that law are substantially the same as, if not more drastic than those against trade names "false or deceptive" in section 5 of the meat inspection law. This also appears in the able discussion found in a later decision of this Court explaining the law of misbranding in a most lucid and clear opinion.

> Weeks v. U. S., 245 U. S. 618

Those two statutes, the meat inspection law and the food and drugs act, are *in pari materia;* and when it comes to brands and distinctive or proprietary names for food products, we respectfully submit that all the statutes concerning the article of

food or food product involved should be considered, in construing the meaning of any of them. (See decision cited to our *Point* 2.)

When appellee found that its return to the use of cream would be unavailing to satisfy the Bureau officers, and that even that undesirable change of its business formula would not suffice without the mutilation of this trade label, and a specification thereon of the "exact percentage of cream" (Rec. pp. 63, 87) it was obliged to resort to the court for injunctive relief against the final order of the Bureau (Jan. 31, 1914) just quoted. That ruling of the Bureau was but an attempt to fix the standard of quality of "Creamo" and beyond the powers of the Bureau under the law.

U. S. v. Butter, 188 Fed. 157

Such Bureau attempts to regulate beyond the powers in the statutes are void.

Morrill v. Jones, 106 U. S. 466
U. S. v. Boeckman, 176 Fed. 382

The interference by the Bureau with the use of this trade-mark amounted to an attempt to revoke the approval of the mark by that department, and of two other executive Departments, the legality of which attempt appellee denies, and cites the decisions to our **Points** 6-9 to express our position.

The fact that oleomargarine was never intended to be questioned as a good "trade name" under the meat inspection law is manifested by the *Regulations* of the Bureau as to mixtures. They **expressly exclude oleomargarine.**

"Regulation 17, **Labeling**" (1914), sec. 9, paragraph 8. (See copy in our **Appendix A**, p. A 5)

We have not repeated all the facts in this sum-

mary. They appear fully in this Brief; but on them under the principles we have stated in our *Points* above, we respectfully submit that the decrees below should be affirmed.

II

The statutory powers governing such marks

The Bureau of Animal Industry rests its appeal to this Court on three assumptions, all of which are groundless.

> 1st. The Bureau starts with the false assumption that "Creamo" and "cream" are one and the same word.
>
> 2nd. That a registered trade mark or brand is the name (or a part of a name) usual to meat or meat-food products.
>
> 3rd. That appellee to retain its property right in the trade mark or brand must conform its formula to the Bureau assumption that "cream" and "Creamo" are one and the same.

(a) There need be little discussion of the first assumption. It should be plain that there is a difference in the two words even to those who may run while they read. It should be sufficient to say that "cream" is a word that could not be registered as a trade mark. Under the oleomargarine regulations of the Internal Revenue Department, it would not be approved as a proper brand. If "**Creamo**" was an established trade name "usual to such" (food) "products" it would be found and defined in the standard dictionaries.

(b) As to the second assumption: that a registered trade mark or brand is the name or part of a name

"usual to such" (meat or meat food) "products" as are mentioned in the first part of section 5 of the meat inspection law, it is most earnestly submitted that a careful reading of that law will disclose that Congress has restricted the Bureau of Animal Industry to much narrower limits than contended by learned counsel for the Government. That law declares that no **such** meat or meat-food products shall be sold or offered for sale under "false or deceptive" trade names. The question naturally arises, what is the trade name of the product in question? We insist that the name of the product with which the Bureau of Animal Industry is concerned under the meat inspection law is wholly and solely "**Oleomargarine**". By the Act of August 2nd, 1886 (known as the Oleomargarine law) Congress has described a certain food product and given it the name "Oleomargarine". A reference to Section 6 of the Oleomargarine Law shows that Congress took into consideration the marking and branding of that product, and charged the Commissioner of Internal Revenue (subject to approval by the secretary of the Treasury) with the duty of prescribing by Regulations those **marks** and **brands**. He has done so. (See Oleomargarine Regulations No. 9, Revised July, 1907; and copy in our **Appendix A**).

In keeping with Section 6 of the law and those Regulations the word "**Creamo**" has been approved by the Commissioner (Rec. p. 29) as a proper brand or trade-mark for appellee's oleomargarine.

Had "Creamo" been the "trade name" of the product or a part of the name of the product, it would not have been approved by the Commissioner of Internal Revenue under the oleomargarine law and regulations. These *Regulations* provide that no device

or brand shall be printed on any print or roll of oleomargarine in any statutory package unless the word "*Oleomargarine*" is also impressed thereon. The *Regulations* further provide that under no circumstances will any manufacturer be permitted to impress or brand upon any print or roll of oleomargarine (or any wrapper covering the same) any device, word, or words calculated to induce the public to believe that it is the product of the dairy or butter, even though the word "oleomargarine" appears on the same. So the ruling of the Internal Revenue Commissioner approving the "**Creamo**" label is his decision that the present contention of the Bureau of Animal Industry is groundless.

It should also be borne in mind that appellee registered in the United States Patent Office the word "**Creamo**" as a suitable "trade-mark for oleomargarine" under the law of 1905 (Rec. p. 47). It is part of the law and of the duty of the Department of Trade-marks to reject from registration any proposed mark which is either deceptive, descriptive or not original, and to co-operate with the other Departments in its action (34 Stat. 168; 35 Stat. 627).

Ex parte Barclay, C. D. 1905, 174
Levy & Co. v. Uri, C. D. 1908, 461

The registration of "**Creamo**" as appellee's trade-mark was in June 1908, after the approval thereof by the B. A. I. as well as by the Treasury Department.

It is respectfully submitted that when two executive Departments of the Government, with special powers over oleomargarine brands and trade-marks, have formally approved this brand and mark as being proper, those approvals necessarily preclude and bar the claim that "Creamo Oleomargarine" is an estab-

lished trade-name, or a name which is "usual" to meat or meat-food products, within the meaning or intent of the meat inspection law.

The Commissioner of Internal Revenue could not or would not, under the oleomargarine law, approve a word which was the trade name of the product. It should be plain that when Congress said a certain product was to be specified and marked as "Oleomargarine" appellee would have no authority to change the Act of Congress by arbitrarily adding or subtracting something from the name so designated. It should also be plain that had the word "**Creamo**" been the trade name of a product, the United States Patent Office would not have registered it as a trade-mark.

The meat inspection act provides that no *such* meat-food products (as are referred to in section 5) should be sold in interstate commerce under any false or deceptive name. Under that law, Oleomargarine could not be shipped and sold as butter; lard compounds as lard; mutton tallow as oleo oil; hog livers as beef livers; or beef sausage as pork sausage. Those are established "trade names", with which the meat inspection law is concerned. But when it comes to brands on oleomargarine, which are private property, two executive Departments above mentioned are vested by law with special powers in no way conflicting with or touched on in the meat inspection law. We have noticed with interest that part of the learned brief for appellants (p. 12) which contends that where a decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive. Our claim is that the heads of two execu-

tive Departments, specifically charged by special laws governing, severally, oleomargarine brands and trade-marks, have passed on and decided that appellee's "*Creamo*" brand and mark were proper when used on oleomargarine. Who may justly maintain, under the special oleomargarine law, that the Commissioner of Internal Revenue has powers on oleomargarine brands subsidiary to those of the Bureau of Animal Industry? Who may justly maintain, under the general meat inspection Act, that the chief of that Bureau can cancel or prevent the use of a trade-mark, duly considered, approved and registered under the powers conferred by the trade-mark Act of 1905?

We have found no authority in any law to authorize the Bureau of Animal Industry to revoke the approval of "Creamo" by the three Departments, in the manner attempted in this case and many rulings to the contrary. (See decisions under our **Points** 6-9.)

(c) The third assumption of the appellant is that appellee, to retain its property rights in its trade-mark or brand, must conform its formula to the fallacy that "*cream*" and "**Creamo**" are one and the same word. The appellee has been frank to admit that it varied its formula for making its "**Creamo**" brand of oleomargarine from time to time. It is further in evidence that better oleomargarine can be produced without cream and that at one time such a product has been sold (Rec. p. 88). It is further in evidence that plaintiff wrote the Bureau of Animal Industry (May 20th, 1913, Rec. p. 66) that it had decided to return to the use of cream in these goods "and make our formula conform to your interpretation of this label." Notwithstanding this fact the

Bureau of Animal Industry was not satisfied but imposed the impossible condition of mutilating the established brand or trade-mark by inserting a new word **"Brand", "in uniform size, style" and coloring** (Rec. p. 87) which would destroy the established property value of the trade-mark, as the evidence shows (Rec. pp. 72-3).

It is further in evidence (Rec. p. 86) that the Chief of the meat inspection Bureau, under date October 27th, 1913, refused appellee the right to use its trade-mark, notwithstanding appellee offered to set out a statement in connection therewith that said brand "Creamo" was a registered trade-mark.

The record is plain that, while the appellee denied the legal authority assumed by the Bureau of Animal Industry, it was desirous to meet any reasonable or even extreme interpretation of the meat inspection law, hoping all the while to be able to maintain the integrity of its brand and trade-mark.

To sustain the contention of appellant that trade-marks are subject to cancellation on account of changes in the formula of the product would lead to untold confiscation of property rights involved under the trade-mark law. Is it possible for a collateral executive Department to wipe out property rights conferred by a duly registered trade-mark, to say nothing of a brand approved by the Commissioner of Internal Revenue under the special powers conferred by the oleomargarine law?

Reading together all the laws regarding brands of food articles, it seems to us that the attempt of the Bureau to regulate the formula of "*Creamo Oleomargarine*" is directly in conflict with the principles expressed in them, and in recent decisions of the

courts; and that in the case at bar the ultimatum of the Bureau officers, January 31, 1914, was beyond their powers.

U. S. v. Coca Cola Co. 241 U. S. 286
Weeks v. U. S. 245 U. S. 618
U. S. v. Butter, 188 Fed. 157
St. Louis Packing Co. v. Houston, 215 Fed. 553
Armour & Co. v. Bird, 159 Mich. 1

Although oleomargarine is still defined as a fat obtained from cattle (6 Century Dict., 1911, p. 4101) sec. 2 of the Act of 1886 shows that it has developed to a mixture of fats; and this record discloses (p. 88) that the largest factory in the world "produces a strictly vegetable oleomargarine without any animal fat whatever". Yet the Act of Congress keeps the same trade name on it, and defines it as in section 2 (for which see our **Appendix A**). Milk or cream has been "*churned*" with the other ingredients, as part of the regular process of its manufacture to give the article a flavor.

Wiley, *Foods* (1907) p. 189

See "Meat Inspection" *Regulation* 18, sec. 5, parag. 3 (in our *Appendix A*, p. A5) which shows that milk or cream is generally used "in the manufacture of oleomargarine".

But skimmed milk has proven better than cream to flavor the product, because the fat in the cream decomposes and becomes rancid sooner than if milk be used, as the record explains (p. 67). Now the regulation of the formula of this food product has not been committed as yet by federal law to the Bureau of Animal Industry, and in the present state of development, we respectfully submit that the courts below were right in holding that the ultimatum of the

learned officers of the Bureau, Jan. 31, 1914, were in excess of their authority, to say nothing of its direct conflict with the *Regulation* of the Treasury Department placing every trade-mark "in close proximity" with the word "oleomargarine". (See **Appendix A**, p. A 6.)

III

The nature of the trade-mark "*Creamo*" on *Oleomargarine*.

We regard other facts already given at some length as furnishing ample ground for the decree below. Yet the nature of the trade-mark in question has a bearing upon the general equities of appellee's position, and cannot well be slighted, especially as the attitude of the learned officers of the Bureau of Animal Industry appears deeply tinctured with the impression that the appellee's mark is merely **descriptive** or generic, means "cream", and as such is deceptive. Appellee claims that it is an original, invented, fancy, arbitrary, coined word, merely intended to distinguish the oleomargarine of appellee's manufacture from others, and to be used on brands or labels for "Creamo Oleomargarine" as an article of food under whatever formula the maker might use, so long as it contains no "poisonous or deleterious ingredients".

It is no new proposition that, as an element of attractiveness, a suggestion is a sound starting point on which to build a coined word. A high authority, referring to the word "*Magico*", as not infringing the word "Magic", as a trade-mark, said that a "newly coined word brings with it such an element of novelty as to itself attract attention and prevent confusion in the minds of ordinary purchasers"

Ex parte Am. Chem. Co. C. D. 1893, 16 (17)
Penn. Salt Co. v. Myers, 79 Fed. 90
(Other decisions under our **Point** 11.)

In the case at bar the word "**Creamo**" is obviously intended **not to be** "cream"; yet it is, of course, suggestive of cream, the idea of which in our language is not only associated with the fatty part of milk, but with excellence or "the choicest part" of anything, according to all the standards of our vernacular. The appellee's President, after describing "Creamo" as an "arbitrary", "coined word" (Rec. p. 44) said that it "while not *descriptive* was suggestive" of cream, and was originally a cream product (Rec. p. 59). But that did not bind appellee always to use cream in its formula, because of the trade-mark "Creamo".

The result of the appeal does not depend on this issue, for the alert officers of the Bureau in their ultimatum which appellee felt to be the last "straw that broke the camel's back" (Rec. p. 62) demanded much more than the use of cream in place of milk to flavor its product. They required the trade-mark to be altered in form and in language; and the **exac** **percentage** of cream to be "**stated on the label** in connection with the words 'Creamo Brand Oleomargarine'" (Rec. pp. 63, 87) under penalty of refusal to certify the product for interstate shipments, after March 1, 1914. That demand we have not as yet seen any law cited which sustains. But the nature of the trade-mark itself, properly appreciated, will demonstrate more clearly how far astray the learned officers of the Bureau have wandered from the principles of the law of trade-marks on which so many valuable rights in the world of trade depend. A trade-mark often represents a large value; and when it does, that value depends on that delicate asset: good will, which experience demonstrates to be very

sensitive to the effect of any change in the object which attracts the old trade. It is not only of common knowledge but in evidence that such a change in the trade-mark in this case as the learned Bureau officials demanded, by their letters (the last of Jan. 31, 1914) would "make it foolish, ludicrous and absolutely destroy its value as a trade-mark" (Rec. pp. 72, 73).

The circumstance that "Creamo" bears an attractive suggestion is an argument in its favor. It does not make the word descriptive or generic. It adds to its value as an invented word and veritable trade-mark. (See decisions cited to our **Point** 11) Such suggestion, when not descriptive or generic, is no blemish to the mark. Many of the most valuable and popular trade-marks are suggestive, yet the public understands them as marks of ownership only. We doubt if anyone outside the Bureau of Animal Industry ever supposes that there are any pearls in "*Pearline*" (an article well known by its trade-mark) or that there is any "**Nigger Hair**" in the smoking tobacco sold under that mark

Leidersdorf v. Flint, 50 Wis. 401

Or real "**Gold Dust**" in the washing powder so named

Fairbanks Co. v. Luckel Co., 102 Fed. 327

Or any cream in "Cream of Wheat"

Ex parte Cream of Wheat Co., 62 MS D. Oct., 1897 (9 Gouriek Dig. 74)

Or in "Cream" Baking Powder

Price Co. v. Fyfe, 45 Fed. 799

Food Co. v. Powder Co. 37 App. (D. C.) 137

Or in "*Jersey Cream*" cornmeal

Ex parte Dahnke-Walker Co. 133 O. G. 1423

Or in "*Cream Acid Phosphate*"
U. S. v. Bbls., "Food and Drug Decisions" (1906, Gwinn) p. 212
Or in "Creamalt" bread
Fox Co. v. Glenn, 191 Mass. 344 (78 N. E. 89)
Or any cedar in "Cedarine" furniture polish
Allen v. Walker, 235 Fed. 230

Those are merely types of a class of trade-marks which deceive nobody, and yet have a fetching suggestion that brings business.

The trade-mark "Ivory" as applied to soap has been long known and recognized as valid.

Goodwin v. Ivory Soap Co., 18 P. R. 389

Yet we suppose no one beyond official circles of inspection would ever imagine that that soap was composed entirely of ivory. When it was first manufactured and put upon the market it was of a somewhat yellow tint resembling ivory in color. The name is suggestive of ivory, but, since it originated, by improved processes of refining vegetable oils it is now made white. Yet we suppose no Court would permit any Department to withdraw from the owner on that account any property rights in that valuable trade-mark because of the change in the process of manufacture. The same principles apply to our brand. The history of the discovery of oleomargarine as a food, and an economical substitute for butter, and of its improvement by experience, indicates that the ingredients of that product are constantly subject to change. Sec. 2 of the Act of Congress concerning it assumes that fact (See our **Appendix A**, p. A 3.) From animal fats used at first, some of the best improved methods now approve strictly vegetable fats used by

some manufacturers. The original invented trade-mark **"Creamo"**, to designate appellee's "make" of statutory "oleomargarine" (popularly known otherwise as "*butterine*") should not be held, we respectfully submit, to be a barrier to the maker's right to improve its formula in the development of its manufacture, as scientific progress may require.

The decisions cited to our *Points* 10, 12 should be consulted in case of any doubt as to the validity of "Creamo" as a trade-mark. We respectfully claim that it is valid and should be sustained.

IV

The Remedy Applied

Before this suit was brought, the appellee made every effort to conform to the Bureau demands, deciding to return to the use of cream in the make-up of its product (Rec., p. 66) and in other ways already described. If there was ever any error in changing its formula from cream to skimmed milk for the betterment of the product (Rec. p. 67) the error was corrected so far as concerned appellants by the acts of appellee after the Bureau officers began to complain in August, 1912. From that time until the appellants' ultimatum (Jan. 31, 1914) appellee, making every reasonable concession short of mutilating the trade-mark itself, found the Bureau officers more and more inflexible in their demands for an **entire change** in the language of the label and for specification thereon of "the exact percentage of cream" used in the manufacture. To that length appellee declined to go. The decisions cited to our **Points** 13, 14 we hope will be found to declare principles which justify ap-

pellee in applying to a court of equity for the remedy which was accorded it to safeguard its trademark, of whose large value appellee would otherwise have been deprived, with very scant observance of the usual methods which belong to due process of law.

In Conclusion, we ask pardon for the length of our argument, induced only by our earnest wish to leave no feature of the case uncertain. The carefully considered opinion of the learned Circuit Judges of the Court of Appeals will receive from your Honors that attention which it so justly merits. If we have not obscured the large equities of appellee upon the undisputed facts by elaborating the details too much, we shall be glad. We are firmly convinced that appellee has acted in good faith, and that the decrees below should be affirmed.

S. Mayner Wallace
Shepard Barclay
Solicitors and of Counsel for Appellee

St. Louis, Mo., March, 1919

APPENDIX A

Supreme Court of the United States

James Brougham, et al.
Appellants
vs
The Blanton Company
Appellee

Folio No. 26,096

APPENDIX A

For the convenience of the Court we reprint several excerpts from statutes and department Regulations referred to in the Briefs

Statutes

Section 5 of the **Meat Inspection** law:

"(5) That when any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked 'Inspected and Passed' shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this act is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been 'Inspected and Passed' under the provisions of this act; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this act is maintained shall be deemed to be complete until such

meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

From the **Food and Drugs Acts**

Sec. 8. "That the term "misbranded", as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

* * * * * * *

In the case of food:

* * * * * *

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to

be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. (34 Stat. L. 769.)

Fed. Stat. Annot. Supp. 1909, p. 139, 140.

From the **Oleomargarine** law

Section 2, act of August 2, 1886:

"That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

Section 6, act of August 2, 1886:

"That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked,

stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers" * * * etc.

Department Regulations

Bureau of Animal Industry (1914)

Reg. 17. **Labeling.**

"Section 8. A meat food product when composed of more than one ingredient shall not bear a label with a name stating or indicating that the product is a substance which is not the principal ingredient contained therein, even though such name be an established trade name. The term 'principal ingredient,' as used in this section, shall be construed to mean that such ingredient is equal to or exceeds in amount the other ingredients combined, exclusive of cereal and water. If the ingredients are stated on the label, they shall appear in the order of their percentages. For example, sausage containing pork and beef shall not be labeled 'pork sausage,' but shall be labeled 'pork and beef sausage.' However, if the pork ingredient equals or exceeds 50 per cent of the meat content, the sausage may be labeled 'pork sausage, beef added.' A product consisting of veal, pork and beef shall not be labeled 'veal loaf,' but may be designated as 'veal, pork, and beef loaf.' However, if the veal ingredient is not less than 50 per cent of the meat content of the product, the product may be labeled 'veal loaf, pork and beef added,' the words

'pork' and 'beef' to appear in the order of their percentages, as above indicated'' (p. 45).

* * * * * * *

''*Paragraph* 8. Labels for mixtures, **other than oleomargarine**, consisting of fat derived from carcasses of cattle, sheep, swine, or goats and any vegetable oil, shall bear the names of the ingredients in a prominent manner, in the order of their percentages, preceded by the statement 'composed of,' or 'made from,' or an equivalent statement. Tierces and barrels containing 'compound,' or 'lard substitutes,' or 'lard compound,' shall, immediately after filling, be legibly marked on one end, and on the side near the end, with the true name of the product. Tin pails, drums, tubs, and similar containers of such products shall bear the true name of the product also on the side at the time of filling'' (pp. 46-47).

Reg. 18. *Preparation of Meat and Products* Section 5.

* * * * * * *

''*Paragraph* 3. Pumps, pipes, conductors, and fittings used to conduct milk, cream, or mixtures of milk or cream in the manufacture of oleomargarine shall be of sanitary construction, with smooth inner and outer surfaces of noncorrosive material or coated with nickel, tin, or other approved material, readily demountable for cleaning, and shall be kept clean and sanitary'' (p. 50).

Regulation 26.

''Section 1. Inspected and passed meat and products, like uninspected meat and products, shall comply with the provisions of the food and drugs act in every respect. Failure to comply'', etc. (p. 69).

Regulations (Oleomargarine, 1907)

(Internal Revenue Department)

"Manufacturers are permitted to pack prints, bricks, and rolls of oleomargarine in statutory packages, subject to the following restrictions:

I. No device or brand shall be imprinted upon any brick, print, or roll of oleomargarine packed in any statutory package unless the word 'Oleomargarine' is also impressed thereon in letters equal in size to those used in expressing any brand or word used by the manufacturer. When no display is made except a device, then the word 'Oleomargarine' shall be impressed on such brick, print, or roll in letters not less than one-fourth of an inch square, and in all cases the word 'Oleomargarine' shall be equally displayed with any brand or word used by the manufacturer, in close proximity thereto, and on the same surface of such brick, print, or roll.

* * * * * * *

III. Manufacturers will be permitted to impress upon their rolls, prints, or bricks marks or embellishments in the way of a finish for the same, without the word 'Oleomargarine' appearing thereon, provided said marks or embellishments are first presented in duplicate photographic copies, serially numbered, to this office for approval. The wrappers for these rolls, prints, or bricks may be in blank; but if any mark, device, or brand is used, the word 'Oleomargarine' must appear in letters one-fourth of an inch square and in close proximity thereto and on the same surface of each brick, print, or roll. The

practice of placing the word 'Oleomargarine' on the wrapper in such position that when around the brick, print, or roll the device or brand appears on one surface and the word 'Oleomargarine' on the edge of another is not in compliance with these regulations.

IV. Under no circumstances will any manufacturer or dealer be permitted to impress, brand, or mark upon any print, brick, or roll of oleomargarine, or on any wrapper covering the same, any device, word, or words calculated to induce the public to believe that it is a product of the dairy, or butter, even though the word 'Oleomargarine' appears on the same" (pp. 38-9).

(*See also Regulations, "Oleomargarine,"* **Appendix B**, pp. B 23-30)